LAW, PSYCHIATRY, AND FREE WILL

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IN THIS SYMPOSIUM *United States v. Durham* is hailed for its redefinition of the limits of criminal responsibility in mental illness. Almost a century ago a similar redefinition was adopted in New Hampshire,[1] but until 1954 no American court or legislature had followed this lead. Under the traditional *M'Naghten*[2] test, which was rejected in these decisions, evidence of mental illness may be considered only if it establishes that the accused was unable to understand the moral quality of his act. Psychiatrists have long complained that this test apparently excludes those serious mental illnesses which make it impossible for the individual to control certain impulses although he recognizes his actions as "wrong." The same criticism has been made again and again by legal writers. In some states (and the District of Columbia) the *M'Naghten* test has been supplemented by an "irresistible impulse" rule, but many judges have refused to take this step and even where the rule has been recognized it has been rather narrowly applied.

Why is it that courts and legislatures have been so tardy in changing the *M'Naghten* rule? One source of hesitancy has been the tension between the traditions of law and psychiatry in relation to free will. It is important to explore possibilities for relieving this tension if the *Durham* rule is to have wide adoption and if it is to be successfully administered.

In the *Durham* opinion, the connection between free will and responsibility is explicit.[3] For Judge Bazelon, the issue is as follows: Did the defendant's act stem from mental disease or defect, or was it the result of an exercise of free will? If the latter, moral blame attaches, and criminal responsibility is therefore imposed; if the former, criminal responsibility should not be imposed because moral blame does not attach.

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[1] State v. Pike, 49 N.H. 399 (1869); State v. Jones, 50 N.H. 369 (1871).

[2] M'Naghten's Case, 10 Cl. & Fin. 200 (H.L., 1843).

[3] P. 876.

Many psychiatrists have insisted upon abandonment of the concept of responsibility based upon free will and moral blameworthiness. This is the central theme of *The Criminal, the Judge, and the Public,* by Dr. Franz Alexander, then of the Psychoanalytic Institute of Berlin, and Hugo Staub, a practicing attorney. In their chapter on responsibility, the authors "make bold and enter the Augean stables of philosophy of law. . . ." They dismiss the concept of free will as "an expression of the narcissistic wish, or even the postulate of the moralists that the Super-Ego does, or should rule, supreme and unlimited in the psychic apparatus of men. . . ." On the contrary, "[p]sychoanalysis considers the human psychic apparatus as a system which is fully, and without a single gap, determined by psychological and biological causative factors."[4]

It is this theory of human behavior which is viewed with alarm by many lawyers. Thus an American Bar Association committee warned in 1945 that the spread of psychoanalytic doctrines "calls for careful consideration" because these doctrines "tend toward determinism."[5] The committee hinted darkly that adherence to these views may disqualify psychiatrists as expert witnesses on mental capacity and responsibility.

Lawyers and psychiatrists are thus prone to sterile deadlock on the question of moral fault and the retributive function of the criminal law. Such a deadlock is highly unfortunate; it not only obscures the great area common to the two traditions, but also breeds a defensiveness in which extension of common ground is impossible. In this comment I shall try to illustrate the kind of agreement which is possible among lawyers and psychiatrists who are loyal to their respective traditions and yet mindful of the limits of their respective disciplines.

Laying aside the question of the reality of free will, lawyers and psychiatrists can agree that the great majority of people should be treated *as if* they had free will. Indeed, careful judges often speak of legal responsibility as based upon an *assumption* of free will. Thus Mr. Justice Cardozo spoke of the law as "guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[6] Mr. Justice Jackson has said:

[4] Alexander and Staub, The Criminal, the Judge, and the Public 70, 71 (1931). See also Freud, General Introduction to Psychoanalysis 45, 95 (Riviere trans., 1943).

[5] 70 A.B.A. Rep. 338, 339 (1945).

[6] Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated through the ages by theologians, philosophers, and scientists. Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.[7]

Similarly, Dr. Alexander has written:

[W]e may for practical purposes hold the individual responsible for his acts; that is to say, we assume an attitude as if the conscious Ego actually possessed the power to do what it wishes. Such an attitude has no theoretical foundation, but it has a practical, or still better, a tactical justification.[8]

Furthermore, lawyers and psychiatrists are largely in agreement as to reasons for treating most people in this manner. Whatever the skepticism as to the deterrent effect of punishment upon actual offenders, it is agreed that criminal responsibility must be imposed for its general deterrent effect. Psychoanalysts, in particular, insist that "normal," peaceful citizens need, in the management of their instinctual drives, the support of the law and its threat of punishment. Nor do either lawyers or psychiatrists exclude the possibility that imposition of responsibility may have a teaching or reformatory effect, however difficult it may be to accomplish this end and however inadequate may be the efforts actually made.

It is agreed, therefore, that most people should be treated as if their actions proceeded from free choice. But it is also agreed that such treatment is inappropriate for some individuals. How is this minority to be identified? This is the problem of the *Durham* case. Psychiatrists may object to Judge Bazelon's test—the presence or absence of free will, but the objection may be largely verbal. Dr. Alexander, for example, urges that a scientific concept of responsibility would be based upon "the degree and mode of *participation of the Ego in a given act.*"[9] Similarly, according to the recent report of the Committee on Psychiatry and Law of the Group for Advancement of Psychiatry:

[E]go impairment would appear to be a direct measure of responsibility. Ego impairment implies lessened control in maintaining behavioral norms of social interaction. In law, such would be the basis of exculpation. . . . On this level of abstrac-

[7] Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 79–80 (1941).

[8] Alexander and Staub, op. cit. supra note 4, at 72–73.

[9] Ibid., at 74.

tion the lawyer and psychiatrist can agree. The psychiatrist can determine that ego impairment exists and the lawyer can transpose the fact into his terms of intent and responsibility.[10]

The committee proposed a statute providing for acquittal (and hospital commitment) if the act was a consequence of illness which so lessened the accused's capacity to use "his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution."[11]

As the lawyer reflects on this psychological concept of responsibility, he notes that here responsibility is a term referring to an individual's capacity for "judgment, discretion and control" in the conduct of his affairs. The psychiatrist tells him, furthermore, that most (if not all) human beings have a capacity to grow in responsibility; that in healthy individuals such growth can come in response to life experience and that in the mentally ill it normally comes only in response to therapy.

Here the lawyer may raise a question. In a given situation is the possibility of growth in responsibility fully determined by the existing character of the individual and the relative strength of the various external factors? Or is there a residual element of choice or personal response? Faced with this question, not all psychiatrists are dogmatic in their determinism. The following quotation is from Dr. Stanley A. Leavy of the Yale School of Medicine:

> Insofar as we approach the subject inductively we can come out with nothing but a deterministic view; causality is even seen to reign within the moral life as it does elsewhere. . . . [But] only a prejudice would make us deny the reality of all our choices. A scientific statement of the matter at this point seems to me this: that we really have moral choices, and that when we examine them, we find their determinants, and these two clauses are not reducible to one another, *i.e.*, the discovery of causality in human experience does not exhaust its meaning.[12]

In psychotherapy this question of choice may be put as follows: If therapy is to be successful, must the patient exert effort and, if so, is the exertion of effort fully explained by tracing its appearance to existing character traits and to the new determinants brought to bear by the therapist? This question was raised in an address on *Determinism, "Freedom," and Psychotherapy*,[13] by Dr. Robert P. Knight as presi-

[10] Group for Advancement of Psychiatry, Criminal Responsibility and Psychiatric Expert Testimony, Report No. 26, p. 6 n. 21 (1954).

[11] Ibid., at 8.

[12] Leavy, Psychological Understanding of Religious Experience 15–16 (1953).

[13] 9 Psychiatry 251 (1946).

dent of the American Psychopathological Association. The address was a direct and elaborate rejoinder to the bar association warning referred to above. It expounded a thoroughgoing determinism and yet insisted upon the necessity for effort. After puzzling over this address, I wrote to Dr. Knight asking whether there is not a paradox between psychological determinism and the notion of "effort" which patients (and everyone else) must make in order to grow in responsibility. (I had laid a wager with one of my colleagues that Dr. Knight would admit the existence of paradox.) He replied as follows:

> Yes, I puzzled quite a bit over the paradox of psychic determinism vs. "effort," and have not yet reconciled it to my satisfaction. One can say that the effort itself is also determined—which seems to be something of a tour de force—or one can concede that, especially in psychotherapy, one expects and mobilizes more effort than the amount which is yet "determined" by previous experience. Such factors as transference (in therapy), inspirational influences, and conceptions of one's self or of one's completed work, projected into the future, may be regarded as determining factors, but I still, at this stage of my thinking at least, feel that there is something left over. Harry Emerson Fosdick . . . calls it a "personal rejoinder" to life experience. I think you win your bet.

Such concessions by psychiatrists pave the way for self-questioning on the part of the lawyer. He has been unwilling to admit that free will is only an expedient assumption; but does he assert the reality of a freedom coextensive with that which the law assumes? Does he affirm anything broader than the limited power the existence of which psychiatrists such as Dr. Knight and Dr. Leavy at least do not deny? This, as I see it, is a power to accept or reject opportunities for growth in responsibility. Acceptance of such opportunities means acceptance of external help and of painful self-knowledge; rejection means rejection of help and refusal to endure the growing pains of advance toward responsibility.

In such a view the area of free choice is far more limited than the area assumed by common-sense notions of moral responsibility. In many situations, the help which is necessary for moral growth is not present or its presence is not realized. The individual cannot therefore strictly be said to act with free choice or to be at fault. However, in common-sense morality and in law, he is treated as if having wider freedom of choice. Here the lawyer recognizes that in imposing the wider responsibility "the law" imposes *vicarious* responsibility, i.e., responsibility for consequence of the acts of others who have determined the individual's character and actions. The lawyer notes, also,

that it is impossible in actual situations to separate this vicarious responsibility from the residual responsibility for choices freely made. Nor does the healthy, mature person make any attempt at such a separation; he treats himself as fully responsible.

These reflections are somewhat disturbing. One concern of the lawyer is with the morality of the criminal law (apart from mental illness). He is not satisfied to make punishment merely a matter of social expediency. He is shocked by Holmes's letter to Laski:

> If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.[14]

This is revolting; but would it be any more satisfactory to modify the "philosophical talk" as follows?

> I don't doubt that your act was largely the result of the acts of your parents and others who determined your character. At the moment of your crime you may have had no real freedom. But when you first thought of this crime, didn't you have some freedom to turn in another direction? And at many points in your life have you not failed to take advantage of opportunities to act constructively when supporting influences were available? We can never know the extent to which an act is the result of such failures. The law makes no attempt to do so; it treats you as fully responsible and thus in part makes you suffer vicariously for the acts of others.

This may not seem, at least at first glance, an attractive resolution of the problem of retribution, and the lawyer may now be tempted to abandon the retribution concept. But some psychiatrists warn against this course. Thus Dr. Robert Waelder has pointed out that everyone, without exception, believes that retribution in some sense should follow violation of law; he explains that the apparent opponents of retribution merely hold someone other than the criminal guilty of his act—"society," "the ruling class," etc.[15] Dr. Waelder has also written:

> [T]he complete elimination of the concept of retribution from the legal system may not be without danger. It would tend to dissociate the law entirely from moral sentiment. If the law no longer must conform, by and large, to moral standards, utilitarianism or expediency becomes its only guide. The emancipation from traditional moral sentiments, begun at first for humanitarian purposes, may eventually have consequences not so humanitarian. Once everything can be done that appears to be socially useful, *i.e.*, that is so considered by those who have authority to define social usefulness, a course has been charted that may well end in despotism.

[14] Holmes-Laski Letters 806 (Howe ed., 1953).

[15] Waelder, Psychiatry and the Problem of Criminal Responsibility, 101 U. of Pa. L. Rev. 378, 386–87 (1952).

Liberal positivism, in its humanitarian distaste for the harsher aspects of traditional morality, may, by undermining the authority of traditional morality, become the path-breaker of more ruthless successors. The humanitarian goal . . . seems to me to be better served by the progressive mitigation of the severity of retribution rather than by an attempt to eliminate the retributive aspect altogether.[16]

If, despite such warnings, the idea of retribution were to be abandoned, the law's concept of responsibility might be stated in terms which are entirely forward-looking. It might be said that the law summons all men to responsibility. It expects the relatively healthy, "deterrable" individuals to respond with only the help which the common life affords. It therefore punishes because "the law must keep its promises." Those unable to respond it segregates by commitment, with opportunity (more or less) for growth in responsibility in the course of therapy.

Such a view may satisfy the lawyer if he may posit a duty (as well as a limited power) to become responsible. Perhaps the poignancy of the difficulty can be expressed only by the poet. Thus, to quote Robert Penn Warren:

> . . . For if the thing
> Accomplished would seem to accomplish only its own
> Inevitability, and the thing that exists
> Would seem to fulfill only its own being, . . .
> Yet the accomplished was once the unaccomplished
> And the existing was once the non-existing,
> And that transition was the agony of will
> And anguish of option—or such it seems
> To any man who has striven in the hot day and glare of contingency
> . . . And such it seems
> To all who would lay a strong hand strongly on life,
> And as for the others, let us wish them well
> In the ineluctable sterility of their various sanatoria
> Where all the light is like a light from snow,
> And hope that there's always somebody to change the bedpans.
> No, that is wicked. We know we all need grace,
> And pity too, and charity is the index
> Of strength, but, by God, that's still no reason
> To regard all history as a private alibi-factory
> And all God's gleaming world as a ward for occupational therapy.
> For if responsibility is not
> The thing given but the thing to be achieved,
> There is still no way out of the responsibility
> Of trying to achieve responsibility.
> So, like it or lump it, you are stuck.[17]

[16] Ibid., at 387.

[17] Warren, Brother to Dragons 111–12 (1953).

What may continue to trouble the lawyer is the vicarious character of legal responsibility (and of common-sense moral responsibility) once the limits of free will are recognized. He has assumed that vicarious liability is exceptional; now he is asked to recognize that liability for "fault" is also in large measure vicarious. Perhaps he may get used to this idea, particularly when he finds that it is not merely a creature of the dialectic of law and psychiatry. He can find this idea in discussions of responsibility in the tradition of Christian ethics. Thus, in the words of Sir Walter Moberly:

> [Responsibility is not] simply a liability arising out of a power. It may also be a power arising out of a voluntary, and apparently quixotic, embracing of a liability that could have been disputed. . . .
>
> It may be [that it is] by the acceptance of a moral liability greater than appears to be due that moral advance is made.[18]

The foregoing pages indicate the possibility of profound understanding between psychiatrists and lawyers; their collaboration need not be in an atmosphere of hostile armistice. As for *United States v. Durham,* it is to be hoped that psychiatrists will not cavil at Judge Bazelon's use of the concept of free will, recognizing that this refers to an "as if" conception which they also accept as a practical tool in dealing with relatively healthy people. It is to be hoped also that lawyers and legislators will consider on its merits the change effected by the decision, free from the fear that it necessarily weakens the moral force of the law.

[18] Moberly, Responsibility 53–54 (1951).